No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. THERE IS A REAL AND DURABLE SPLIT BETWEEN THE MOST IMPORTANT LOWER ADMIRALTY COURTS 2

II. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THIS IMPORTANT ISSUE 4

III. THE DECISION BELOW IS INCORRECT 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Atlantic Sounding Co. v. *Townsend*, 557 U.S. 404 (2009) ..... *passim*

The City of Carlisle, 39 F. 807 (D. Or. 1889) 12

Gibson v. *American Cyanamid Co.*, 760 F.3d 600 (7th Cir. 2014) 3

Guevara v. *Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) 6

In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972) 6

King v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc) 3

Mahnich v. *Southern Steamship Co.*, 321 U.S. 96 (1944) 9

McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 9

McBride v. *Estis Well Service, LLC*, 853 F.3d 777 (5th Cir. 2017) 2

McBride v. *Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) ..... *passim*

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 3, 5, 9-11

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 9

Pacific Steamship Co. v. *Peterson*, 278 U.S. 130 (1928) 7, 9

The Rolfe, 293 F. 269 (N.D. Cal. 1923) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Seaboard Air Line Railway v. *Koennecke*, 239 U.S. 352 (1915) 7

The Troop, 118 F. 769 (D. Wash. 1902) 12

OTHER AUTHORITIES

Brown, Mandy, American Ass'n for Justice, *Ninth Circuit Rules Punitive Damages Available for Unseauorthiness Claims* (Feb. 22, 2018), https://www.justice.org/news-and-research/law-reporter-and-trial-news/february-22-2018-trial-news 2

IN THE

Supreme Court of the United States

No. 18-266

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Fifth and Ninth Circuits, which hear most maritime injury cases in the federal courts, have reached directly opposite conclusions as to whether punitive damages are available in actions for unseaworthiness under general maritime law. That question is important, given the constitutional mandate to maintain uniform maritime law and the potentially serious consequences of allowing punitive damages for unseaworthiness. Respondent's opposition offers no persuasive reason why this Court should deny review.

ARGUMENT

I. THERE IS A REAL AND DURABLE SPLIT BETWEEN THE MOST IMPORTANT LOWER ADMIRALTY COURTS

The Ninth Circuit held that punitive damages are available in unseaworthiness actions, the Fifth Circuit held the opposite, and this Court should resolve that disagreement. In fact, shortly after the court of appeals issued its decision here, respondent's counsel told the media that "[t]his decision creates a split between the Ninth and Fifth Circuits," and acknowledged the likelihood that this Court would grant review to resolve the split. Brown, Am. Ass'n for Justice, *Ninth Circuit Rules Punitive Damages Available for Unseaworthiness Claims* (Feb. 22, 2018).[1]

Respondent's strained effort to reinterpret the Fifth Circuit's decisions falls short. Respondent claims (at 5) that "a majority" of the en banc Fifth Circuit in *McBride* v. *Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014), "rejected the argument [that] petitioner advances here." There are several problems with that contention. First, a later Fifth Circuit panel—which respondent ignores—stated unqualifiedly that its "prior en banc decision ... hold[s] that punitive damages are not available ... on [plaintiffs'] Jones Act and general maritime law claims." *McBride* v. *Estis Well Serv., LLC*, 853 F.3d 777, 780 n.1 (5th Cir. 2017), *cert. denied sub nom. Touchet* v. *Estis Well Serv., LLC*, 138 S. Ct. 644 (2018). Second, the Ninth Circuit acknowledged in the decision below that the Fifth Circuit's decision in "*McBride* ... *holds* that punitive damages ... may not be recovered under the Jones Act or under the general

---

[1] https://www.justice.org/news-and-research/law-reporter-and-trial-news/february-22-2018-trial-news.

maritime law," referring to unseaworthiness actions. Pet. App. 6a (punctuation modified; emphasis added).

Focusing on the precise reasoning of the various opinions in *McBride*, as respondent does, does not diminish the split or the need for this Court's review. The Fifth Circuit's controlling rule is still the opposite of the Ninth Circuit's. The holding of the Fifth Circuit is not determined by cobbling together an apparent majority from concurring and dissenting opinions. That would yield the absurd result that the court's holding contradicted its judgment in the same case. *Cf. Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 620-621 (7th Cir. 2014) ("dissenting opinions cannot be counted under *Marks* to create binding precedent"); *King* v. *Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority").

In any event, contrary to respondent's suggestion (at 6-7), a majority of the en banc Fifth Circuit explicitly rejected the position that was adopted by the Ninth Circuit. The lead opinion, joined by seven judges, concluded that, "[b]ased on *Miles* [v. *Apex Marine Corp.*, 498 U.S. 19 (1990),] and other Supreme Court and circuit authority, ... [p]unitive damages are not recoverable" in unseaworthiness (and Jones Act) actions, whether the seaman was killed or injured. *McBride*, 768 F.3d at 391. Tracking *Miles*, the lead opinion explained that "Congress ha[d] struck the balance for us in determining the scope of damages"—with respect to "personal injury actions as well as ... wrongful death action[s]." *Id.* at 388-389 (punctuation modified).

According to respondent (at 6), two concurring judges "explicitly disagreed with [the lead opinion's] reasoning on the personal-injury claims." That distorts

those judges' position, which was not markedly different from the lead opinion's analysis. They explicitly "concur[red] in the reasoning expressed in the majority opinion with respect to the wrongful death ... claims." 768 F.3d at 401. Although they did not agree that *Miles* "dictate[d] the outcome" for personal-injury claims—because, they explained, *Miles* involved only a wrongful-death claim (*id.* at 401-402)—they did not "follow[*Atlantic Sounding Co.* v.] *Townsend*," 557 U.S. 404 (2009), or otherwise agree with the view taken by the dissent there (or respondent and the Ninth Circuit here), as respondent claims (at 9). To the contrary, they explicitly stated that they "cannot join the dissenting opinions with respect to the surviving seamen." 768 F.3d at 402 (Haynes, J., concurring). They specifically *rejected* the dissent's position, which—like that of the Ninth Circuit and respondent here—rested heavily on *Townsend*; as they explained, *Townsend* "addressed only maintenance and cure" and therefore was not controlling in unseaworthiness cases. *Id.* at 404 (Haynes, J., concurring); *see* Pet. 17-20.

There can be no doubt that the Fifth and Ninth Circuits disagree on the question presented here. Had this case been brought in the Fifth Circuit, respondent's claim for punitive damages would have been dismissed. Nothing further is needed to establish a circuit conflict.

II. This Case Is An Appropriate Vehicle To Resolve This Important Issue

The divisions among lower courts—between the Ninth and Fifth Circuits, and also between the Washington Supreme Court and other federal and state appellate courts (*see* Pet. 8-9)—is important and deserves this Court's prompt attention.

A. The Constitution "mandate[s]" nationally "uniform" maritime law. *Miles*, 498 U.S. at 27; Pet. 26; Br. of At-Sea Processors Ass'n et al. ("ASPA Br.") 5. As long as the current division persists, vessel owners and operators will face uncertainty about their potential liability. Pet. 11 & n.5, 26; ASPA Br. 6. The inconsistency also provides vessel owners that operate primarily off the Gulf Coast an unwarranted financial advantage over those that operate primarily off the Pacific Coast, and gives plaintiffs an incentive to engage in forum shopping. No policy justification supports such a result.

Further, the substance of the ruling below is deeply problematic. The potential for massive punitive damages awards will likely increase operating costs for maritime owners and employers, to the detriment of our national economy, environment, and security. Pet. 23-26; ASPA Br. 3-4, 7-10 (allowing punitive damages for unseaworthiness "will markedly increase maritime operators' litigation costs, result in higher prices for consumers, make the U.S. maritime industry less competitive with industries in countries whose law precludes punitive damages").

Respondent does not deny the constitutional imperative to eliminate the inconsistency in maritime law, but does deny that allowing punitive damages in unseaworthiness cases threatens serious harms. Respondent questions (at 19, 21) whether there is support for the notion that recognition of punitive damages for unseaworthiness would cause "the collapse of the economy, the destruction of the environment, and the undermining of national security." But petitioner has not made, and need not make, such dire claims. Rather, petitioner has noted—as many courts and commentators have observed—that punitive damages, especially in

such an important sector of the economy, can have adverse consequences and do raise serious concerns. *See* Pet. 23-26.

Moreover, actual experience is far less informative than respondent asserts, because there has never been a sustained period when punitive damages were available in unseaworthiness actions. As respondent concedes (at 20), the discussion of punitive damages in *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), was "dicta." A few cases in the 1980s allowed punitive damages for unseaworthiness claims, as petitioner acknowledged. *See* Pet. 16 n.10. But that regime was fleeting, because it was widely understood that in 1990 *Miles* "effectively overruled" those cases and foreclosed punitive damages for unseaworthiness. *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated by Townsend on other grounds*, 557 U.S. 504; *see* Pet. 8-9 (collecting post-*Miles* cases rejecting availability of punitive damages).

B. According to respondent (at 11-14), review of the question presented is "premature" because (a) the Court could not reverse the Ninth Circuit's decision on unseaworthiness unless it also addressed whether punitive damages are available for Jones Act negligence claims, and (b) the Court would "benefit from further percolation on [the Jones Act] issue ... in light of *Townsend*." That argument lacks merit.

There is no serious doubt that punitive damages are unavailable in negligence actions under the Jones Act. As petitioner has detailed (Pet. 13-16), for more than a century this Court has consistently recognized that the Jones Act and the statute it incorporates, the Federal Employers Liability Act ("FELA"), restrict recovery to *compensatory* damages and thus disallow

punitive damages. *See, e.g., Pacific S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928) (Jones Act and unseaworthiness provide "right to recover compensatory damages"); *Seaboard Air Line Ry.* v. *Koennecke*, 239 U.S. 352, 354 (1915) (reasoning that claim for punitive damages must have arisen under state law because FELA did not allow punitive damages). Respondent ignores those precedents, but the lower courts have not, consistently concluding that punitive damages are unavailable under the Jones Act. As the en banc Fifth Circuit observed, "no cases have awarded punitive damages" under the Jones Act. *McBride*, 768 F.3d at 388. Indeed, respondent must have recognized as much, for his complaint did not request punitive damages under the Jones Act—which it surely would have done had respondent thought the question remained open.

Respondent's assertion (at 12-13) that *Townsend* warrants reconsideration of this settled view is baseless. In *Townsend*, the Court neither provided "guidance" on this issue nor recognized it as an "open question." Br. in Opp. 12-13. All the Court said was that it would "not address the dissent's argument" that punitive damages are unavailable in Jones Act negligence actions. 557 U.S. at 424 n.12. Respondent points to nothing in *Townsend* suggesting that the settled view is questionable.

Moreover, it is not correct that the Court could reverse the decision below only if punitive damages are unavailable under the Jones Act. As noted in the petition (Pet. 20 n.11), and as seven Fifth Circuit judges have concluded, even under the *Townsend* framework punitive damages would be unavailable, because there is no evidence that such damages were available for unseaworthiness claims before the Jones Act. *McBride*,

768 F.3d at 394-399 (Clement, J., concurring); *id.* at 403 (Haynes, J., concurring); *see infra* III.C.

C. Respondent argues (at 14) that the Court should deny the petition because "the jury may decide not to award punitive damages." That is just another way of saying that this petition arises in an interlocutory posture, but that is not a good reason to deny the petition. Indeed, this Court heard *Townsend* in the same interlocutory posture. 557 U.S. at 408; Pet. 27. The Ninth Circuit's decision squarely announces a rule of law that will govern all future cases arising in that circuit. That ruling substantially increases the potential liability faced by maritime owners and operators and will amplify plaintiffs' ability to pressure owners and operators to settle meritless unseaworthiness claims. There is no reason for this Court to defer reviewing the Ninth Circuit's decision until after those adverse consequences have come to pass.

III. The Decision Below Is Incorrect

Respondent is fond of saying (at 3, 18-19) that petitioner adopts the same "far too broad" reading of *Miles* that the Court rejected in *Townsend*. Respondent is mistaken. *Townsend* rejected the argument that *Miles* had defined the limits of recovery in *all* types of actions under general maritime law. *See* 557 U.S. at 418-419. Petitioner makes no such argument; rather, petitioner has pointed to *Miles*'s emphasis on the close relationship between *unseaworthiness* actions under general maritime law and negligence actions under the Jones Act. Respondent's failure to acknowledge that aspect of *Miles* is a fundamental flaw in his position.

A. Just a few years after the Jones Act's enactment, this Court explained that, unlike maintenance

and cure, Jones Act negligence is "an alternative of ... unseaworthiness." *Peterson*, 278 U.S. at 138. Thus, whether a claim invokes negligence or unseaworthiness (or both), "there is but a single wrongful invasion." *Id.* The Court has reaffirmed that unseaworthiness and Jones Act negligence are alternatives to each other but not to maintenance and cure. *See, e.g.*, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958). Those relationships explain the differing outcomes in *Miles* and *Townsend*, and also explain why this case falls under *Miles*.

Because unseaworthiness and Jones Act negligence are alternatives, they have been understood to have a similar remedial scope. As the Court put it long ago, unseaworthiness and Jones Act negligence embody a single "right to recover compensatory damages" and thus "entitle[the plaintiff] to but one indemnity by way of compensatory damages." *Peterson*, 278 U.S. at 138 (emphasis added). Or, as the Court put it in *Townsend*, unseaworthiness is "an alternative of the right to recover compensatory damages under the Jones Act," such that "the seaman may have ... one of the ... two." 557 U.S. at 423-424 (punctuation altered).

The Court's post-Jones Act "transform[ation of] the warranty of seaworthiness into a strict liability obligation" added an important constitutional dimension to the relationship between unseaworthiness and the Jones Act. *Miles*, 498 U.S. at 25-26.[2] Given that "revolution," this Court explained, "[i]t would be inconsistent with [the Court's] place in the constitutional scheme to

---

[2] "The revolution in the law [of unseaworthiness] began with *Mahnich* v. *Southern S.S. Co.*," 321 U.S. 96 (1944). *Miles*, 498 U.S. at 25 (punctuation altered); *see Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 398 (1970).

sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—that is, unseaworthiness as redefined after the Jones Act—than Congress had sanctioned for negligence under the Jones Act. *Miles*, 498 U.S. at 25, 32-33 (punctuation altered). Consequently, any "limit" on damages that Congress placed on negligence under Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability," *i.e.*, post-Jones Act unseaworthiness. *Id.* at 31, 36.

As the Court later explained in *Townsend*, *Miles*'s analysis does not govern the proper remedy for maintenance and cure because "the maintenance and cure right is in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act." *Townsend*, 557 U.S. at 423-424 (punctuation altered). Rather, "the seaman may have maintenance and cure *and*" a recovery under (either) Jones Act negligence or unseaworthiness. *Id.* Consequently, the Court did not overstep its constitutional role by defining the remedial scope of maintenance and cure beyond the remedial scope of the Jones Act. *See id.* at 420-424.

B. Respondent acknowledges (at 3) this Court's statement in *Townsend* that "[t]he reasoning of *Miles* remains sound," 557 U.S. at 420, but he then ignores the central role that the relationship between the Jones Act and unseaworthiness played in that reasoning. In respondent's view (at 17), the result in *Miles* rested solely on the distinct historical evolution of the remedy for wrongful death. That is a serious misreading of *Miles*. Although the Court first decided whether to recognize a claim for wrongful death based on unseaworthiness, 498 U.S. at 30-31, the Court's ensuing analysis of the remedial scope of the claim—as the passages

just quoted show—turned on the relationship between unseaworthiness and Jones Act negligence.

And the Court's reasoning in *Miles* is directly relevant to punitive damages for unseaworthiness whether the seaman was injured or killed. Either way, the unseaworthiness action is a post-Jones Act creation of the courts rather than Congress, and the scope of recovery should not depend on the happenstance of whether the seaman dies from the injury—any more than it should depend on which alternative cause of action the plaintiff invokes. The Court in *Miles* did not fail to recognize that its decision would apply to personal injury cases as well as wrongful death cases; the Court made clear that it would "not create, under our admiralty powers, a remedy ... that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury* and death." 498 U.S. at 36 (emphasis added).

C. Even if Congress had not spoken to the scope of recovery and so the *Townsend* framework applied, the decision below would be wrong. The dispositive question in that analysis would be whether punitive damages were historically available for unseaworthiness claims, at least before the Jones Act was enacted. *See* 557 U.S. at 414-415. There is no evidence that they were. As Judges Clement and Haynes recognized in *McBride*, silence here speaks loudly, for the historical record yields a total absence of cases recognizing punitive damages in unseaworthiness claims. 768 F.3d at 394-399 (Clement, J., concurring); *id.* at 403 (Haynes, J., concurring).

The cases respondent cites (at 17 n.6) do not show that punitive damages were available for unseaworthiness before the Jones Act. *The Rolph* was decided after the Jones Act and gave no indication that it was ap-

plying a pre-Jones Act understanding of unseaworthiness that permitted punitive damages. 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924). In fact, it consistently described the damages as "compensation." 293 F. at 271-272; *see Townsend*, 557 U.S. at 431 (Alito, J., dissenting); *McBride*, 768 F.3d at 395-397 (Clement, J., concurring). The punitive-damages award in *The City of Carlisle* concerned maintenance and cure. 39 F. 807, 816-817 (D. Or. 1889). And in *The Troop*, the only damages awarded were based on maintenance and cure—and were only compensatory. 118 F. 769, 770-773 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904); *see McBride*, 768 F.3d at 395 n.16 (Clement, J., concurring). Neither history nor logic therefore supports punitive damages in unseaworthiness cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NOVEMBER 2018